2001

Reid D. Bench and Alta M. Bench v. Erma Pace : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

REID D. BENCH and ALTA M. BENCH, his wife,
Plaintiffs and Appellants,
vs.
ERMA PACE,
Defendant and Respondent.

Case No. 13929

APPELLANTS' BRIEF

Appeal from the Judgment of the Fourth District Court for Uintah County, Honorable Allen B. Sorensen, Judge

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STATEMENT OF THE TYPE OF CASE

This is an action for specific performance of a written Lease Option Agreement wherein plaintiffs purchased from defendant a 120 acre farm located in Duchesne County, State of Utah. The defendant refused to convey a fee title to the property claiming that under the terms of an oral agreement entered into by the parties at the time of the execution of the written document, it was agreed the mineral rights to the property would be reserved to the defendant.

DISPOSITION IN THE LOWER COURT

The trial court admitted into evidence the alleged

oral agreement and other extrinsic evidence, and other parol evidence overruling plaintiffs' objection and motion to strike, and based upon said evidence, reformed the written document to include a reservation of the mineral rights to defendant. Further, the court ruled that plaintiffs did not exercise the option in accordance with the written agreement and entered Judgment restoring possession of the property to defendant and damages of reasonable rental value.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the decision and Judgment entered by the trial court in reforming the written Lease Option Agreement and for a Judgment by this Court granting plaintiffs specific performance of said written Lease Option Agreement and awarding to plaintiffs fee simple title to the property.

STATEMENT OF FACTS

On September 8, 1965, Reed D. Bench and Alta M. Bench, his wife, as Buyers, entered into a Lease-Sales Contract (Ex. 2) with Erma Pace and Aaron Pace as Owners. The subject matter of the Lease-Sales Contract was a certain irrigated farm located approximately 10 miles northwest of the City of Roosevelt, Utah. The contract described the property more particularly as follows:

> "NE ¼ NE ¼; Section 28, T. 1 S., R. 2W., U.S.M. and also E ½ SE ¼; Section 21, T. 1 S., R. 2W., U.S.M."

The contract provided certain terms for a three year lease from the date of the execution of the contract. It also provided that the Buyers would have the option to purchase the farm and put forth the terms and conditions of that purchase. Included among those terms and conditions were the total price of the purchase, that the down-payment should not be less than $2,000.00, that the interest rate would be 5% annually on the unpaid balance, the minimum annual payment, that title insurance should be furnished by the Sellers, that certain personalty was to go with the farm, that certain plants could be dug up should the option not be exercised, and that balloon payments could be made to reduce the principal balance due more rapidly.

On May 22, 1967, Erma Pace and Reid Bench entered into a Lease-Extension Agreement extending the time for the exercise of the option for five additional years, making the date of expiration of the option September, 1973 (Ex. 16)

On January 8, 1971, Mr. Bench exercised his option to purchase the land by tendering the $2,000.00 requirement along with back rental payments. (Exs. 15, 18) The check for $2,000.00 as well as the other checks were endorsed and deposited by Mrs. Pace. (R. 85)

Subsequent to that tender, a dispute arose between the parties. That dispute is summarized in a letter signed by John C. Beaslin, Erma Pace's lawyer, dated April 5, 1971, in which the following was communicated to Mr. Bench:

"This letter is to advise you that Mrs. Pace has contacted this office with reference to an apparent misunderstanding with reference to your letter dated September 8, 1965, and your subsequent extension of that lease agreement by the parties.

Pursuant to the terms of the lease and your paying the $2,000.00 please be advised that this does not constitute a sale of the property, and it will be necessary and mandatory if you want to proceed to exercise the option provision of your lease that the same will have to be converted to a sale of the 120 acres. Also, pursuant to the escrow agreement which Mr. Sam prepared, and which you have a copy of, would have to be executed or you will merely continue on with the lease until the same expires by its terms, which would be September 15, 1973.

If you want to exercise the option to purchase the property, then it will be necessary that you either sign the escrow agreement and place the same at the bank, together with a deed from Mrs. Pace to be delivered upon the payment of the contract amount in full, or, it will be construed that you have not in fact bought the property.

It is going to necessitate your paying more than $1,000.00 per year on the unpaid balance of the contract, or, as you stated to Mrs. Pace, you would never pay for the property. Would you, therefore, please advise this office either personally or through your attorney as to how you want to complete the transaction with Mrs.

Pace. I await your reply with reference to this matter." (Ex. 7)

The escrow agreement referred to in Mr. Beaslin's letter, (Ex. 6), had, prior to that time, been examined by Mr. Bench, and he commented about it to Mr. Beaslin in a letter dated April 12, 1971, wherein he said:

> "I have not signed the papers prepared by Mr. Sam because these terms are being changed. The papers prepared by Mr. Sam make no reference at all to the original Lease Purchase Agreement completely ignoring the facts there . . . I will take a day off this week and contact Mrs. Pace and/or yourself to see if this misunderstanding can be resolved." (Ex. 8)

After negotiations for settlement between the parties were unsuccessful, Mrs. Pace sent a letter dated June 2, 1971, indicating to Mr. Bench that his tender had been refused. That letter notified him that he was now back on the lease basis of the contract and told him that he owed various amounts of money for rent accrued since the time of the tender. (Ex. 17)

In reply to the letter of June 2, 1971, Mr. Bench sent to Mrs Pace the sums of money she claimed he owed for rental and other items. In the letter he sent accompanying those payments, he made this statement:

> "It is only our desire and intention to purchase the farm per our original lease purchase

agreement and the terms there outlined." (Ex. 10)

Being unable to reach any sort of negotiated settlement, this action was commenced on the 30th day of November, 1972, prior to the expiration date for the exercise of the option.

At trial counsel for the defendant introduced parol evidence and other extrinsic evidence over the objection of counsel for the plaintiffs as to the intention of the parties at the time of the execution of the original Lease Sales Contract. Mrs. Pace claimed that at the time of signing the Lease Sales Contract the parties had agreed that the oil and mineral rights were to be reserved to her and her son, Aaron. (R. 78) As the pleadings to this action indicate, this evidence was to show that there was either a fraud perpetrated by Mr. Bench at the expense of Mrs. Pace or that the parties were mutually mistaken as to the content of that contract.

As to her intent or understanding at the time of the execution of the Lease-Sales Contract, Mrs. Pace testified as follows:

"Q. You were aware very early in the proceedings of the failure to have the reservation of oil and gas rights in the document, were you not?

A. I was aware that it should have been in there before I ever signed it." (R-110)

Counsel for plaintiffs objected to the introduction of testimony of various witnesses as to any and all oral conversations and any other extrinsice evidence in which plaintiffs purportedly conceded the oil and gas rights were to be reserved to defendant and her son, Aaron. The grounds for this series of objections and the motion to strike at the conclusion of the case were as follows: (R. 154-159)

> 1. The contract on its face was complete and unambiguous and the testimony was not offered for the purpose of, nor did it purport to explain any ambiguity within the instrument.
>
> 2. No evidence was before the court, nor was any evidence introduced upon which a finding of mutual mistake of fact or fraud could be made, and without such evidence no sufficient foundation was laid which would make such testimony admissible.
>
> 3. The Utah Statute of Frauds, Section 25-1-1 U.C.A. 1953, as amended, prevents the introduction of extrinsic evidence to a clear and unambiguous contract or conveyance of real property.
>
> 4. The Utah Statute of Limitations for the claiming of a fraud or mistake, Sections 78-12-25 and 78-12-26(3) of the Utah Code Annotated 1953, as amended, and laches prevents defendant from raising those defenses at this late date.

ARGUMENT

POINT I.

THE LEASE SALES CONTRACT CONVEYED A FEE SIMPLE INTEREST IN THE PROPERTY DESCRIBED, INCLUDING ALL OIL, GAS AND MINERAL RIGHTS.

There can be no question that the Lease Sales Contract constituted a conveyance subjecting the parties to all rights and liabilities pertaining to conveyances, and the court below has not ruled differently.

Section 57-1-1, U. C. A. 1953, as amended, provides:

> "The term 'conveyance' as used in this title shall be construed to embrace *every instrument in writing* by which any real estate, *or interest in real estate* is created, aliened, mortgaged, encumbered or assigned, except wills and leases for a term not exceeding one year." (Emphasis added)

The Lease Sales Contract signed and executed by the parties provides in part as follows:

> "This agreement made and entered into this 8th day of September, 1965 between Erma Pace and Aaron Pace hereinafter referred to as the owners and Reid D. Bench and Alta M. Bench, hereinafter referred to as the Buyers, whereby the Owners have agreed to LEASE and subsequently SELL to the buyers *that certain one hundred twenty (120) acre*

> *irrigated farm* located approximately ten miles northwest of the city of Roosevelt, County of Duchesne, state of UTAH, *and more particularly described as follows*:
>
> NE ¼ NE ¼; Sec. 28, T. 1S., R. 2W., U.S.M. and also E ½ SE ; Sec. 21, T. 1S., R. 2W U.S.M." (Exhibit 2)

The foregoing language wherein the owners agreed to lease and subsequently sell "that certain one hundred twenty (120) acre irrigated farm * * * more particularly described as follows:" with no reservation of any rights, gives rise to a clear presumption that the Seller has conveyed a fee simple estate in the property. Section 57-1-3, U. C. A. 1953, as amended, reads as follows:

> "A fee simple title is presumed to be intended to pass by a conveyance of real estate, unless it appears *from the conveyance* that a lesser estate was intended." (Emphasis added)

It is equally clear from the language of the statute that the presumption that a fee simple title is intended to pass cannot be rebutted "unless it appears *from the conveyance* that a lesser estate was intended." See: *Russell* v. *Geyser-Marion Gold Mining Company*, 18 U. 2d 363, 423 P. 2d 487 (1967).

In the case at bar the defendant has conceded not only that the conveyance does not purport to convey a lesser estate than a fee simple title, but that she was

well aware of the fact before she ever signed the document. She testified:

> "Q. You were aware very early in the proceedings of the failure to have the reservation of oil and gas rights in the document, were you not?
>
> A. I was aware that it should have been in there before I ever signed it." (R. 110; see also R. 104-105)

The common law rule supports the Utah statutory rule and is likewise to the effect that a general conveyance without an exception or reservation of the minerals therein passes the mineral rights as well as the surface rights *and that a severance occurs only by clear and distinct wording in the conveyance.*

In 54 Am. Jur. 2d, *Mines and Minerals*, Section 108, the rule is set forth as follows:

> "A general conveyance of land without any exception or reservation of the minerals therein carries with it the minerals as well as the surface. A severance occurs only by clear and distinct wording in the conveyance. Until such a severance occurs, the ownership of the surface carries with it the ownership of the underlying minerals."

And in 58 C. J. S., *Mines and Minerals*, Section 134, it is said:

> "However, in the absence of a separate

grant or conveyance thereof, minerals in place belong to the owner of the surface of the land beneath which they lie, and pass with it by deed, gift or other form of conveyance."

And, again, in Section 146:

"In accordance with such rules, a general conveyance of land with minerals, without any exception or reservation, passes to the purchaser or his heirs and assigns the whole interest of the vendor in the property described.

* * *

"A conveyance of land passes all minerals therein, where it contains an express provision to that effect and, even though it does not contain such a provision or specification, it is well settled at common law that a general conveyance of land *without an exception or reservation of the minerals therein,* or language showing that the title to minerals is not intended to pass, will carry the grantor's right to, and interest in, all coal, oil, gas and other minerals in the land." (Emphasis added)

See also: *LeBard* v. *Richfield Oil,* 364 P. 2d 449 (Cal. 1961); *Voyta* v. *Clonts,* 328 P. 2d 655 (Mont. 1958).

POINT II.

THE COURT BELOW ERRED IN ALLOWING PAROL EVIDENCE ADMITTED AS TO AN ORAL UNDERSTANDING OR AGREEMENT OF THE PARTIES TO RE-

SERVE OIL, GAS AND MINERAL RIGHTS TO RESPONDENT WHICH WAS NOT CONTAINED IN THE WRITTEN LEASE SALES AGREEMENT.

A. Statement of the Law.

The law is clear and unequivocal that unless there is evidence of fraud or mutual mistake of fact, oral evidence will not be allowed for the purpose of varying the clear and unambiguous terms of a written instrument.

Judge Sorenson of the Fourth Judicial District rendered a decision in the case of *E. A. Strout Western Realty Agency, Inc.* v. *Owen H. Broderick*, ... U. 2d ....., 522 P. 2d 144, (1974), which was reversed for an improper interpretation of the parol evidence rule. The appeal in that case was from a judgment against the plaintiff and in favor of the defendant on a law action to recover a real estate broker's commission based on an exclusive listing agreement. The disputed language of the contract was as follows:

> "If a buyer or transferee ready, willing and able to buy or exchange for this property is procured by you or by anyone else, including myself, I agree to pay you a commission of 6% of the selling price, or a minimum commission of $200.00, whichever is greater."

The defendant persuaded the trial court, by the use of parol evidence, that the language above was not cor-

rect and that he agreed to pay a commission only in case the plaintiff sold the home.

This Court reversed the trial court with the following holding:

> "Parole evidence may be received to clarify ambiguous language in a contract, to show what the agreement was relative to filling in blanks, and to supply omitted terms which were agreed upon but inadvertently left out of the written agreement. However, under the general rule, which is applicable here, parole evidence may not be given to change the terms of a written agreement which are clear, definite, and unambiguous. *To permit that would be to cast doubt upon the integrity of all contracts and to leave a party to a solemn agreement at the mercy of uncertainties of oral testimony given by one who in the subsequent light of events discovers that he made a bad bargain.*
>
> Written words can be examined so as to ascertain what they stand for in connection with particular conduct or particular objects. Thus expressions of the parties prior to and contemporaneous with the execution of a written instrument may be helpful in understanding the meaning of the language used. *However, the defendant here does not seek to explain the meaning of a paragraph. He simply wants the court to eliminate it in its entirety. This the courts cannot do.*" (Emphasis added)

The case of *Rainford* v. *Rytting*, 22 Utah 2d 252, 451

P. 2d 769 (1969), involved a suit between stockholders, and the defendants asserted they were not personally liable and wanted to introduce evidence to support that claim. In affirming the trial court's ruling of Summary Judgment, the court stated:

> "We must agree with respondent that appellants are trying to vary the terms of the written agreement by parol evidence, i.e., to establish a different contract on facts known at the time of reducing their understanding to a written form.
>
> * * * The rule is well settled that, where the parties have reduced to writing what appears to be a complete and certain agreement, it will, in the absence of fraud, be *conclusively presumed that the writing contained the whole of the agreement between the parties,* that it is a complete memorial of such agreement, and that parol evidence of contemporaneous conversations, representations, or statements will not be received for *the purpose of varying or adding to the terms of the written document.*
>
> The action of the trial court in the instant case must be sustained, since appellants' affidavit consisted entirely of inadmissible parol evidence, submitted for the purpose of varying and adding to the terms of the written agreement of the parties."

In *Jensen* v. *Rice,* 7 U. 2d 276, 322 P. 2d 259 (1958), plaintiff brought an action to recover the unpaid balance of the purchase price of an automobile after sale at pub-

lic auction following default in payment. Although the defendant urged that he meant to enter into a different contract and that he did not contract as alleged, the Supreme Court affirmed the enforcement of the contract *as written.* This case is striking in its parallels to the case currently before the court. The court stated:

> "*As to the contentions that defendant did not contract as alleged or that he executed a different contract, both are refuted by, and are inconsistent with defendant's signature on the contract and his admitted knowledge of its terms.* Punctuated by objection, his testimony was diametrically opposed to the manifestation of mutual assent reflected in his execution of an instrument whose terms were clear, unambiguous, understandable and known.
>
> *Elementary it is that in construing contracts we seek to determine the intentions of the parties. But it is also elementary and of extreme practical importance that we hold contracting parties to their clear and understandable language deliberately committed to writing and endorsed by them as signatories thereto.* Were this not so business, one with another among our citizens, would be relegated to the chaotic, and the rules of conduct for the maintenance and improvement of an orderly society's welfare and progress would find itself impotent. It is not unreasonable to hold one responsible for language which he himself espouses. Such language is the only implement he gives us to fashion a determination as to the intentions of the parties. Under such circum-

stances we should not be required to embosom any request that we ignore that very language. This is as it should be. *The rule excluding matters outside the four corners of a clear, understandable document, is a fair one, and one's contentions concerning his intent should extend no further than his own clear expressions.*

It was urged correctly that to admit matters outside a contract would do violence to the principle that one is bound by his manifestations of assent, and that, irrespective of such contention, *such matters properly are excludable by the parol evidence rule, —which rule, counsel suggests, is one of substantive law rather than one of evidence. Whatever kind one calls it, the rule that excludes such evidence is a common sense rule."* (Emphasis added)

The case of *Robert D. Davison, et al.* v. *Arnold B. Robbins, et al.*, 30 U. 2d 338, 517 P. 2d 1026, (1973), was an action by plaintiff for specific performance to purchase real property. The agreement in question provided that the offer was "contingent upon buyer's approval of net acreage description." The trial court permitted the buyers to introduce parol evidence to describe the net acreage and granted specific performance. In reversing the trial court's ruling, the Supreme Court held that the agreement constituted a mere expression to make a contract in the future and reversed the decision.

In discussing parol evidence, the court stated as follows:

> "*Parol evidence is admissible to apply, not to supply, a description of lands in a contract.* Parol evidence will not be admitted to complete a defective description, or to show the intention with which it was made. Parol evidence may be used for the purpose of identifying the description contained in the writing with its location upon the ground, *but not for the purpose of ascertaining and locating the land about which the parties negotiated, and supplying a description thereof which they have omitted from the writing.* There is a clear distinction between the admission of oral and extrinsic evidence for the purpose of identifying the land described and applying the description to the property and that of supplying and adding to a description insufficient and void on its face." (Emphasis added)

In the case of *William R. Clyde* v. *Eddington Canning Company and W. R. Eddington,* 10 U. 2d 14, 347 P. 2d 563, (1959), the defendant attempted to explain that he was not to be personally liable for the agreement. In affirming the Summary Judgment, the court stated:

> "Defendant contends that by signing the letter in the form indicated it was not his intention to be bound personally. He so averred in an affidavit upon which the matter was determined. Under the clear language of the writing we are not impressed with such contention, particularly since *intentions cannot vary the terms of clear, concise, unambiguous lan-*

guage employed by him who says he did not intend what he said." (Emphasis added)

Lenman v. *Jones*, 222 U. S. 51, 32 S. Ct. 18; involved specific performance of a land contract. The seller refused to perform the agreement alleging that the buyers failed to disclose the real parties who were involved in the transaction. The trial court granted Summary Judgment, and Justice Holmes in affirming, stated as follows:

> "It is apparent from her own testimony that she knew that Mrs. Wilhoite was only a figurehead, and the most that can be contended is that she thought that another person, not the appellee, most probably was the real man. It does not matter that she did. She suffered no loss, and, moreover, Mr. Jones and his company were under no obligation to disclose their interest, in the absence of fraud, which there is not the slightest ground to suggest. *It also is urged that the defendant, when she signed the instrument, thought that it merely gave an option. This is an immaterial afterthought. If she did not know what she was doing, she had only herself to thank, but no even one-sided mistake is proved.*" (Emphasis added)

See also: *Hatch* v. *Adams*, 7 U. 2d 73, 318 P. 2d 633; *Rehearing Opinion*, 8 U. 2d 82, 329 P. 2d 285 (1958).

B. The Lease Sales Contract is clear and unambiguous on its face and the trial court has in effect so ruled.

The Lease Sales Contract as executed by the parties on the 8th day of September, 1965, described by legal description the one hundred twenty acre irrigated farm which was the subject of the contract, the consideration to be paid in the event the option was exercised, and the due dates and manner of payment. It required the Seller to furnish title insurance, listed the personal property that went with the land, and concluded by giving the Buyer the option of making accelerated payments to reduce the principal balance due. There is no claim of ambiguity as to any of these terms, and no effort was made by defendant to explain them. (Exhibit 2)

The only contention made by defendant is that the contract did not contain a claimed unwritten oral understanding to reserve the oil and gas rights. Said contention does not amount to an ambiguity. It amounts only to an omission, and it most certainly does not amount to the inadvertent omission to include terms that were previously agreed upon but not included in a written contract as contemplated in *E. A. Strout Western Realty Agency, Inc.* v. *Broderick,* supra. Mrs. Pace acknowledged on cross examination that the Lease Sales Agreement which was signed by her and her son, Aaron, was circulated among all those present at the time of execution; that she and her son read it from beginning to end; that there was no effort whatsoever to make any changes; and, most importantly, in three different places in the cross-examination she affirmatively stated that she knew at the time the contract was signed that it contained no reservation and did not purport to contain any reserva-

tion of oil, gas and mineral rights. (R. 103-104, 110) Therefore, such an omission comes within the language of Section 57-1-3 of the Utah Code and provisions of the Parol Evidence Rule.

The court below has in effect ruled by adding to the Contract a reservation of oil, gas and mineral rights and not interpreting the meaning of the contract that the Lease Sales Contract, (Exhibit 2), is clear and unambiguous on its face. (See Conclusion of Law, paragraphs 1 and 3; Findings of Fact, paragraphs 1 and 4.)

The above contention is further placed beyond doubt by an examination of the prayer for relief in defendant's Second Amended Answer and Counterclaim dated November 1, 1973. Paragraph B shows that defendant framed the issue clearly for the court. There, defendant's primary claim was for an interpretation of the Contract in question and only in the alternative was there a prayer for a reformation to conform to the alleged oral understanding of the parties. The pertinent language is as follows:

> "For declaratory relief interpreting the Agreement to exclude gas, oil and mineral rights or, in the alternative, for reformation of the Agreement to conform to the understanding of the parties, thereby excluding gas, oil and mineral rights."

The court below granted the alternative disregarding the primary prayer.

POINT III.

THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF EVIDENCE OF ANY ORAL AGREEMENT OR AGREEMENTS BETWEEN THE PARTIES, ANY ORAL DISCUSSIONS WITH OTHERS, AND ANY OTHER EXTRINSIC EVIDENCE PRIOR TO, CONTEMPORANEOUS WITH, OR SUBSEQUENT TO THE EXECUTION OF THE LEASE SALES CONTRACT OVER THE OBJECTION THAT SUCH EVIDENCE IS CONTRARY TO THE CLEAR AND PRECISE TERMS OF THE UTAH STATUTE OF FRAUDS.

At best, the claimed oral agreement between plaintiffs and defendant that at some future date Appellants would perform the necessary acts to effectuate a transfer of title to the oil, gas and mineral rights back to Defendant, would be unenforceable as a violation of the Statute of Frauds.

The Utah Statute of Frauds, Section 25-5-1, U. C. A. 1953, states:

> "Estate or interest in real property. *No estate or interest in real property . . . shall be created,* granted, assigned, surrendered or declared *otherwise than* by act or operation of law, or *by deed or conveyance in writing subscribed by the party creating,* granting, assign-

> ing, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." (Emphasis added)

The application of the Statute of Frauds to the case at hand is best summarized in 37 Am. Jur. 2d 110, Fraud and Deceit, in which the authors cite *Papanickolas* v. *Sampson,* 73 Utah 404, 274 P. 856 (1929), to stand for the proposition that:

> "* * * A number of cases state or indicate that the mere refusal to perform (an) oral promise is not of itself a fraud for which an action will lie, since in such a case the promisor has not, in a legal sense, made a contract, and hence has the right, both in law and in equity, to refuse to perform. *It has been said that to allow an action on an unkept promise in some instances is to enforce an oral promise, contrary to the policy of the legislature as declared in the Statute of Frauds. It has also been stated that an action brought upon such a promise will be considered one brought on an unenforceable contract, rather than a maintainable one in tort or deceit where the damages claimed showed that in its essence the action was attempted to be premised upon a breach of the promise falling within the statute* (of Frauds)."

Also, the operation of the Statute of Frauds is not confined to cases where an action is brought directly on the contract, and whatever the form of the acts may be, if proof of a promise or contract within the statute is essential to maintain it, there can be no recovery unless

the statute is satisfied. *Easton* v. *Wycoff*, 4 U. 2d 386, 295 P. 2d 386 (1956).

Of course, the parol evidence argument made previously applies to all written contracts. However, in the case of a contract dealing with the conveyance of an interest in real property, the Statute of Frauds is designed to add an additional stricture on the ability of one contesting the terms of the contract to introduce extrinsic evidence to vary the terms contained therein. It is not enough to say "I thought it was understood" (R. 104) when there is no doubt that the person attempting to vary the terms of the contract had read the entire contract, knew that the contract did not purport to reserve any oil, gas and mineral rights to her, made no attempt in writing to change the terms of that contract, and signed that contract without complaint. (R. 110) It is also interesting to note that Aaron Pace, who was a co-signer of the Lease Sales Agreement and a tenant in common with the defendant, gave no testimony at trial whatsoever concerning any mistake that either he or his mother made at the time of the signing of the document.

It is, therefore, respectfully submitted to this Court that the Statute of Frauds, in and of itself, bars any admission of the extrinsice evidence that has heretofore been mentioned.

POINT IV.

DEFENDANT HAS FAILED TO SUSTAIN HER BURDEN OF PROVING FRAUD ON

THE PART OF PLAINTIFFS BY CLEAR AND CONVINCING EVIDENCE, AND THE COURT BELOW HAS IN ESSENCE SO RULED.

In defendant's Second Amended Answer and Counterclaim dated November 1, 1973, under Third Defense, paragraph 4, is the following contention:

> "If the said Contract fails to reflect the agreement of the parties, such failure is due either to mutual mistake, to mistake in drafting, or to fraud on the part of Plaintiffs arising from their intentional attempt to deprive Defendant of her property rights without just compensation and through deception in the preparation of the said Lease Option Agreement."

Throughout the proceedings in this action, the claim of fraud has been the primary contention of defendant in her defense. This is borne out in the closing statements of counsel at the trial wherein Mr. Boyden stated the following:

> "Mr. Boyden * * * Now then whether this develops into fraud raises another question. If this man is telling this woman that he doesn't want the minerals he just wants to get his family away from the city, and then he goes down and tells a lawyer I want to protect whatever right I have in the minerals, then

we are gettin gto a point where he is talking out of both sides of his mouth.

The Court: Is that fraud?

Mr. Boyden: It is fraud, because he is representing to her what his intention is. He is expecting her to rely upon it, and she does rely upon it, and now he brings an equitable action to try and enforce the lies which he has told her, and that is fraud with every example that you can place under the books with all the tests. This in essence your Honor is our case. * * *" (R. 185)

With that emphasis on the question of fraud, the trial court in its Conclusions of Law and Findings of Fact made no mention whatsoever of any remedial fraud. Therefore, the intent of the trial court is clear in finding that defendant failed in her burden to show by clear and convincing evidence that a fraud had been committed. Nevertheless, because of the trial court's omission to rule directly on the question of fraud, it is important at this point that the issue be briefed.

A. Burden of proof.

The burden is on defendant to prove each and every element of fraud by clear and convincing evidence. See: *Pace, et al.* v. *Parrish, et al.*, 122 Utah 141, 247 P. 2d 273, (1952); *Universal C. I. T. Credit Corp.* v. *Sohm, et al.* v. *Nickles*, 15 U. 2d 262, 391 P. 2d 293, (1964); *Schow* v. *Guardtone*, 18 U. 2d 135, 417 P. 2d 643, (1966).

B. The elements of fraud.

The leading Utah case setting forth the various elements of common-law fraud is that of *Stuck, et al.* v. *Delta Land and Water Co.*, 63 Utah 495, 227 P. 791, (1924). There the court stated:

> "The principles referred to are more tersely stated in 26 C.J. 1062, cited by appellant, from which we quote the following: 'It may be stated generally that the elements of actual fraud consist of: (1) A representation; (2) Its falsity; (3) Its materiality; (4) The speaker's knowledge of its falsity or ignorance of its truth; (5) His intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) The hearer's ignorance of its falsity; (7) His reliance upon its truth; (8) His right to rely thereon; (9) His consequent and proximate injury."

See also: *Pace, et al.* v. *Parrish, et al.*, supra; *Oberg* v. *Sanders, et al.*, 111 Utah 507, 184 P. 2d 229, (1947) and *Estate Counseling Service* v. *Merril, Lynch, Pierce, etc.*, 303 F. 2d 527 (C. A. 10, 1962).

A consideration of the elements of fraud in the light of the evidence adduced in this case will quickly demonstrate how far short defendant has fallen in sustaining her burden of proof.

Element 1: A representation of a present existing fact.

To constitute "actionable fraud," the false representation must relate to past or present fact and not be

merely promissory or the expression of an opinion. See: *Adamson, et ux.* v. *Brockbank, et al.*, 122 Utah 52, 185 P. 2d 264, (1947); *Schow* v. *Guardtone*, supa.

Clearly, the only possible misrepresentation Bench could have made, taking defendant's highly questionable evidence at its best, was promissory in nature and related to a future event that may or may not occur; to-wit, the exercising of the option. It is interesting to note that the notary public was a cousin of defendant (R. 101) that the lawyer who prepared the document had been known by defendant for a lifetime (R. 100), that defendant's son and daughter-in-law were present at the reading and signing of the document (R. 103), that all that needed to be done was to interline a reservation of oil and gas rights if that was so important, that defendant was well aware that the document contained no such reservation (R. 103-104), that no effort was made to reserve oil and gas rights by defendant until over six years after the Lease Sales Contract had been signed (R. 106-107), and that at the time of the execution of the contract there was no oil and gas activity whatsoever in the Duchesne County (R. 99); and all this in the face of defendant's burden to prove by clear and convincing evidence that at the time of signing, plaintiff had an insidious and evil intent to cheat and defraud defendant by deliberately omitting the reservation of oil and gas rights from the contract.

Element 2: Its falsity.

"It is also the majority rule that an in-

> sured is under a duty to read his application before signing it, and will be considered bound by a knowledge of the contents of his signed application. This is merely an application of fundamental contract law." *Theros v. Metropolitan Life Insurance Company,* 17 U2d 205, 407 P2d 685, (1965).

No contention has ever been made that the contract itself contains any false statement. As a matter of fact, as we have pointed out, defendant read the contract before signing same and was fully aware of and alert to the fact that the contract contained no reservation of oil and gas rights. (R. 103-104) The only claim of falsity has to do with a claim that plaintiff subjectively intended to cheat defendant out of her oil and gas rights at a time when he was orally assuring her that they were hers — all this at a time when she was signing a document that did not contain such reservations and at a time when she was fully aware of this fact. This is simply not the kind of falsity, even assuming it to exist, that supports the requirements of proof of the cases we are citing in this brief.

Element 3: Its materiality.

In order for a misrepresentation to be material, it must go to "the very essence" of the transaction and be the "very ground" on which the transaction has taken place. See Kerr, *Fraud and Mistake,,* 73; *Hart* v. *Laitz,* 72 Colo. 315, 211 P. 391, (1922).

In this connection we point out that plaintiff had

only lived in the Roosevelt area for a few weeks. (R. 10) He knew absolutely nothing about oil and gas rights and had had no experience in matters of this kind. (R. 154) We also call attention of the court to the testimony of defendant that "no drilling or exploration" whatsoever was going on in the area at the time — "no oil boom." (R. 99)

Element 4: The speaker's knowledge of its falsity or ignorance of its truth.

Unless fraudulent intent exists when alleged promises and representations are made, they will not constitute fraud for which action at law for deceit may be maintained. *Papinokolas, et al.* v. *Sampson, et al.*, 274 P. 857, (1929); *Schow* v. *Guardtone*, supra.

Element 5: His intent that it should be acted upon by the person and in the manner reasonably contemplated.

In this connection again, it is clear from the evidence that Bench had no knowledge of oil and gas potentials on the farm. (R. 154) He was a new-comer to the area and totally unsophisticated in business matters. (R. 10) A local attorney prepared the Lease Sales Contract. (R. 9) There is no evidence to controvert the inference that all defendant need to have done, if such was the intent of the parties, was to ask that the reservation be included in the document. This she did not do. The notary was a stranger to Bench and the cousin of Pace. (R. 101) Under such circumstances, it is clear that defendant has

failed in her burden of proving by clear and convincing evidence that Bench made misrepresentations and intended that she act upon them. Yet, such would have to to be the case under the requirement of Element 5 if defendant is to prevail on her claim of fraud.

Element 6: The hearer's ignorance of its falsity.

Here again, the falsity would have to be the subjective intent of Bench to exclude the oil and gas rights and to have Erma Pace rely upon his oral assurances that this was an oversight, and that he would protect her, and her ignorance of his malicious intention to deceive. It is clear from her own testimony that defendant knew that the contract contained no oil and gas rights reservation, and thus, that she had full knowledge of all material facts. (R. 104-105, 110)

Element 7: Her reliance upon its truth.

The interesting thing here is that the Lease Sales Contract was signed on September 8, 1965. (Ex. 2) The Lease Extension was signed on May 22, 1967. (Ex. 16) The letter exercising the Option and the cashier's check were delivered to defendant on January 8, 1971, (Exs. 15 & 18) and not until the new proposed Escrow Agreement of Sams (Ex. 6) was presented in May, 1971, was any effort made to reform the original agreement and to exclude oil and gas rights from the purchase. (R. 107) Yet, defendant had the agreement in her possession all this time, and all this time was aware, by her own admission, of the fact said document did not reserve these rights to her. (R. 104)

Element 8: Her right to rely thereon.

(See Statute of Frauds argument.)

We believe that the most important failure of proof on the part of defendant has to do with her right of reliance. The facts pertaining to the content of the contract and its meaning were in her possession. She testified as follows:

> "Q. Well, you knew that there was no reference to oil and gas reservations in that document, isn't that right?
>
> A. Yes.
>
> Q. Yet after the reading of the document and the passing of it around and all of you observing its contents you affixed your signature to the document, did you not, Mrs. Pace?
>
> A. Yes.
>
> Q. You made no effort to make any pencil or pen interlineation to include a reservation of oil and gas rights, did you?
>
> A. No.
>
> Q. And you made no suggestions that the document be retyped or modified in any way at that time, did you?
>
> A. I though it was understood—
>
> Q. I said, you made no suggestion of that kind?
>
> A. No

Q. That was in 1965, September 8th?

A. Right." (R. 104)

and again:

"Q. You were aware very early in the proceedings of the failure to have the reservation of oil and gas rights in the document were you not?

A. *I was aware that it should have been in there before I ever signed it.*" (R. 110)

It is also interesting to note that when the Extension to this Lease Sales Contract was presented to her on May 22, 1967 (Ex. 16), she read the document and signed it without making any request for any changes. Mrs. Pace testified as follows:

"A. I went with him to the lady's house that made it up.

Q. I am sorry. I had forgotten. The two of you went to the lady's house who made it up, and at that particular time you read it, did you not?

A. Yes, I read it.

Q. You understood its contents, did you?

A. I did.

Q. And you placed your signature on that document?

A. I did.

Q. And you voluntarily at that time were willing to grant the extension that is provided by the content of the document?

A. Yes.

Q. You may answer that yes or no.

MR. BOYDEN: Dont' stop her.

MR. BLACK: I want a yes or no answer.

A. I said yes, sir.

Q. (By Mr. Black) There is not a mention in that document of any reservation of oil and gas rights to you, is that not true?

A. That is true." (R. 105)

The above testimony further establishes the fact that defendant was guilty of a form of negligence that under the cases defeats her defense of fraud. Such neglect simply demonstrates that she had no right of reliance whatsoever on any representations on the part of plaintiff regarding oil and gas rights.

Once again it is interesting to note that there is no direct evidence that defendant ever placed any reliance on the claimed oral representations of plaintiff.

In the case of *Migliaccio* v. *Continental Mining and Milling Co.*, 196 F. 2d 398 (C. A. 10, 1952), the Tenth Circuit Court of Appeals states that before one can have relief from a claimed fraud, he must not only show that he relied, but that he had a right to rely. That right of reliance does not exist where he is put on notice.

> "Knowledge which is sufficient to lead a prudent person to inquire about the matter when it could have been ascertained conveniently, constitutes notice of whatever the inquiry would have disclosed, and will be regarded as knowledge of the facts." *Columbian Nat'l Life Ins. Co. v. Rodgers,* 116 F.2d 705.

Element 9: His consequent and proximate injury.

It is necessary in any fraud action for the person claiming the fraud to demonstrate by clear and convincing evidence that he has suffered damages. It cannot merely be a "fraud in the air." *Roosevelt* v. *Missouri State Life Insurance Co.*, 78 F. 2d 752 (C. C. A. 8, 1935).

In the case of *Smith* v. *Belles*, 132 U. S. 125, 10 S. Ct. 39, the Court stated:

> "According to this theory, the question is not what the plaintiff might have gained, but what he had lost by being deceived into the purchase; the defendant is liable to respond in such damages as naturally and proximately result from the fraud; he is bound to make good the loss sustained—such moneys as the plaintiff has paid out, with interest, and any other outlay legitimately attributable to the defendant's fraudulent conduct—*but this liability does not include the expectant fruits of an unrealized speculation.* (emphasis added)

See also: *Morris* v. *U. S.*, 303 F. 2d 533 (C. C. A. 10, 1962); *Rummell* v. *Bailey*, 7 U. 2d 137, 320 P. 2d 653, (1958); *Guaranty Mortgage Co.* v. *Flint*, 66 Utah 128,

240 P. 175, (1925); *Kinnear* v. *Prows*, 81 Utah 135, 16 P. 2d 1094 (1932); *Estate Counseling Service, Inc.* v. *Merrill, Lynch, Pierce, etc.*, 303 F. 2d 527 (10 C. C. A. 1962); *Bryant, et al.* v. *Vaughn, et al.*, 33 S. W. 2d 729 (Tex. 1939); *Toshnek, et al.* v. *Hefner, et ux.*, 282 S. W. 2d 298 (Tex. App. 1955); *Bauder* v. *Johnson*, 36 S. W. 2d 1112 (Tex. App. 1931).

We also point out that there is no evidence as to present value of the oil and gas rights and consequently, no evidence as to defendant's injury. Defendant has simply failed to discharge her burden of proof on this element.

POINT V.

THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT SUSTAINED HER BURDEN OF PROVING MUTUAL MISTAKE OF FACT BY CLEAR AND CONVINCING EVIDENCE AND THAT THE NEGLECT OF DEFENDANT WAS EXCUSABLE.

The trial court in its Conclusions of Law states:

> "1. Defendant had sustained her burden of persuasion by clear satisfactory, definite and convincing evidence that at the time of the execution of the Lease Option, neither plaintiffs nor defendant intended to create an interest in plaintiffs in the oil, gas and mineral estate in the subject property and that the fail-

ure of said Lease Option to contain such a reservation was due to mutual mistake of the parties.

2. Under the circumstances prevailing at the time the Lease Option Agreement was executed, said mutual mistake was not the result of any inexcusable neglect."

It is the contention of plaintiffs that defendant clearly failed to sustain her burden of showing by clear and convincing evidence that there was a mutual mistake of fact.

A. Burden of Proof.

As with the defense of fraud, the burden is on the defendant to prove each and every element of mutual mistake of fact by clear and convincing evidence. See: *Kirchgestner* v. *D. & R. G. W. Railroad Co.*, 118 Utah 41, 233 P. 2d 699, (1951).

B. The legal principles applicable.

The necessary elements to establish a mutual mistake of fact on which a party may obtain relief are set forth in the annotation appearing at 59 A. L. R. 809. The annotation states:

"Equitable relief from a mutual mistake is frequently given by a reformation of the contract. But a contract will not be reformed for a unilateral mistake. Equitable relief may, however, be given from a unilateral mistake by a recission of the contract. Essential conditions

to such relief are (1) the mistake must be of so grave a consequence that to enforce the contract as actually made would be unconscionable. (2) the matter as to which the mistake was made must relate to a material feature of the contract. (3) generally the mistake must have occurred nothwithstanding the exercise of ordinary diligence by the party making the mistake. (4) it must be possible to give relief by way of recision without serious prejudice to the other party except the loss of his bargain. In other words, it must be possible to put him in a status quo."

The leading Utah case on mutual mistake of fact is *Naisbitt* v. *Hodges*, 6 U. 2d 116, 307 P. 2d 620, (1957), where it is stated:

"There are numerous cases in this jurisdiction dealing with reformation of an instrument on the ground of mutual mistake. The guiding criteria are well established. Mutual mistake of fact may be defined as error in reducing the concurring intentions of the parties to writing. (case cited) Evidence necessary to substantiate mutual mistake of fact must be clear, definite and convincing, *and the parties seeking reformation should not be guilty of negligence in the execution of the contract or deed or laches in making timely application for its reformation. This principle has consistently been applied in equity cases throughout the reformation of instrument cases.*" (cases cited) (emphasis added)

See also: *Ellison* v. *Johnson*, 18 U. 2d 374, 423 P. 2d 657, (1967).

Again, it is the contention of plaintiffs in this action that it is completely inconsistent for one to say that there was a mistake when he himself understood very clearly the omission from a contract of an element of the Agreement at the time that the Contract was executed by the parties. At the very least, the elements indicated above would require that the one claiming a mistake, in fact, be mistaken. That is not the case here.

It is essential to point out that the mistake be mutual and as to a material fact, and that the party seeking to set aside a written instrument as a result of such a mistake clearly establish that he or she is free from neglect in connection with such a mistake. (The issue of materiality was discussed previously in Point IV.) If there was a mistake in this case, defendant was grossly negligent in allowing the mistake to be perpetuated by the written Lease Sales Agreement, and again when the extension agreement was granted. On each of these occasions the defendant read the documents in question, fully understood their contents, knew that they did not reserve to her any oil, gas or mineral rights, and nevertheless placed her signature upon them. That she was grossly negligent in letting the years roll by without reforming the contract becomes obvious when we allude once again to her testimony.

"Q. You were aware very early in the proceedings of the failure to have the reser-

vation of the oil and gas rights in the document, were you not?

A. I was aware that it should have been in there before I ever signed it." (R. 110)

The tenor of the position of the Utah Supreme Court and the general law in this area of contracts is best cited in the case of *Garff Realty Co.* v. *Better Buildings, Inc.*, 234 P. 2d 842, (1951), wherein 12 Am. Jur., Contracts, Section 137, pp. 628-629, is cited approvingly as follows:

> "Ignorance of the contents of an instrument does not ordinarily affect the liability of one who signs it. * * * If a man acts negligently and in such a way as to justify others in supposing that the writing is assented to by him, he will be bound both at law and in equity, even though he supposes the writing is an instrument of an entirely different character. The courts appear to be unanimous in holding that a person who, having the capacity and an opportunity to read a contract, is not misled as to its contents and who sustains no confidential relationship to the other party cannot avoid the contract on the ground of mistake if he signs it without reading it at least in the absence of special circumstances excusing his failure to read it. If the contract is plain and unequivocal in its terms, he is ordinarily bound thereby. * * * To permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations

> would absolutely destroy the value of all contracts. The purpose of the rule is to give stability to written agreements and to remove the temptation and possibility of perjury, which would be afforded if parol evidence were admissible. * * *"

This statement of law becomes all the more forceful in the case at bar when it is understood that defendant read and understood the contract and was not deceived in any way as to the contract's contents. By defendant's own admission, there was nothing in that contract she did not understand. (R. 104) Of equal importance is that a party who signs a contract is to be considered bound by a knowledge of its contents. *Theros* v. *Metropolitan Life Insurance Co.*, supra.

The above statements of law apply to general contract law. But it should not be forgotten in this case that this is a conveyance of real property which places the added burden on defendant to comply with the Statute of Frauds. (Discussed in Point III.)

Utah law has long recognized the rule that equity will not cancel an instrument on the ground of mistake of law or fraudulent misrepresentation of law. In *Ackerman* v. *Branmwell Investment Co.*, 80 Utah 52, 12 P. 2d 623, (1932), the court said:

> "The general rule is that misrepresentations of law or of the legal effect of contracts and writings does not constitute remedial fraud."

POINT VI.

THE TRIAL COURT ERRED IN RULING THAT DEFENDANT WAS NOT BARRED BY THE STATUTE OF LIMITATIONS AND LACHES FROM ASSERTING ANY RIGHTS TO THE OIL, GAS AND MINERAL RIGHTS.

A. The Statute of Limitations issue was timely raised.

The Statute of Limitations provisions of 78-12-25 and 72-12-26(3), U. C. A. 1953, as amended; the Statute of Frauds, 25-5-1 et seq., U. C. A. 1953, as amended, and the theories of estoppel and laches have been raised in an equitable, timely manner, giving adequate notice to counsel for the defendant by means of a letter and Memorandum sent to John Paul Kennedy, counsel for defendant, and filed with the court on the 21st day of June, 1974.

With regard to the Statute of Limitations issue, we call attention to Rule 7(a) of the Utah Rules of Civil Procedure. We set forth the rule for the convenience of the Court.

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS

> "(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such. * * * *No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.*" (Emphasis added)

Wright and Miller, *Federal Practice and Procedure*, §§1182, 1184, in discussing Rule 7(a) of the Federal Rules of Civil Procedure, which is identical with Utah Rule 7(a), explains the rule:

> "The purpose underlying the rule that a reply is necessary only if the counterclaim is designated as such is to avoid problems arising out of the similarity between certain counterclaims and affirmative defenses as well as to provide a clear guideline for the pleader to enable him to determine when he must serve a reply. Thus, if the answer does not contain a denominated counterclaim, a reply is not required and in theory not permitted, although the Court is given extensive discretion by Rule 8(c) to allow a reply by treating a counterclaim that is misdesignated as a defense as though it were properly designated and to impose any terms it deems appropriate on the correction of the mistake. The court also may resolve any confusion caused by misdesignation by ordering the pleader to clarify his answer to indicate whether certain allegations are intended as defenses or counterclaims. If a party labels as a counterclaim matter that actually constitutes a defense, a reply technically is improper because there is no counterclaim in fact, although it is difficult to perceive of any significant sanction befalling the pleader should he actually interpose a reply . . ." §§ 1184.
>
> "* * * Thus, the function of a pleading in federal practice is to inform a party of the na-

> ture of the claims and defenses being asserted against him and the relief demanded by his adversary. The rules reflect a realization that the supposed effectiveness of pleadings in narrowing and defining the issues is largely a myth, this function being more effectively performed by discovery, summary judgment, and pretrial conferences." §§ 1182.

See also: *Moore's Federal Practice,* Vol. 2A §§7.00 to 7.06.

It is also clear that this is the rule in Utah when it is plaintiffs rather than defendants who are asserting the applicable section of the Statute of Limitations. See: *Hansen* v. *Morris,* 2 U. 2d 310, 283 P. 2d 884, 886, (1955), where the court stated:

> "As to the contention that the limitations statute was not pleaded and hence was waived: We concede that statutes of limitations generally must be pleaded. Such principle usually applies to *defendants* only. In our instant case we have the unique situation where such a statute must be pleaded by the *plaintiff.* Under Rule 8(c) statutes of limitations must be pleaded and at first blush it would appear that plaintiff is bound by such rule. However, an anomaly is presented where, as here, plaintiff must assert the statute, since the only pleading available to him would be a reply, a pleading unauthorized under Rule 7(a) as a matter of right, except in attacking a counterclaim, and which can only be filed by order of the court.

> Hence, it is obvious that Rule 8(c), in logic and good sense cannot hold a plaintiff seeking to assert a statute to knock out a *defense,* to the same strict accountability that it can a defendant seeking to knock out a *claim."*

See also: *Thomas* v. *Brafett's Heirs,* 6 U. 2d 57, 305 P. 2d 507, (1956).

Based on the above authorities, the issue of the Statute of Limitations was properly before the Court.

B. The Utah three year Statute of Limitations covering fraud and mutual mistake of fact had lapsed both on the Lease-Sales Contract of September 8, 1965, and the Lease Extension executed on May 22, 1967, before defendant first asserted any claim of fraud or mistake.

Defendant signed the Lease Option Agreement in 1965 (Ex. 2); signed an agreement extending the Option in 1967 (Ex. 16); and did not raise her defenses of fraud and mutual mistake until after the filing of this lawsuit in 1972. These basic facts bring the Statute of Limitations into the fore as a valid and important issue when taken in the light of a long line of cases stating the law in Utah. In *Horn* v. *Daniel,* 315 F. 2d 471, (C. C. A. 10, 1962), plaintiff brought an action to set aside a deed covering a grantor's interest in mining claims on the ground of fraud on the part of the grantee. The court found for defendant holding that the Statute of Limitations had run in view of the fact that the grantor had all of the information necessary for the discovery of the

fraud before him during the entire period of the statute. The court stated:

> "Thus it appears that Horn's present claim of injury in 1957 found its motive in the subsequent years, and conduct previously approved finds taint through the consequence of later values. The evidence supports the trial court's finding that Horn was sufficiently apprised of his cause of action prior to October 17, 1957, and was in possession of all facts which would lead an experienced mining man to conclude that Daniel had negotiated with Newmont. *The law does not favor one who withholds a purported interest in a mining enterprise awaiting favorable results,* (case cited) the time of discovery of the existence of fraud is a question of fact, (case cited) and the possession of all information necessary to discover fraud satisfied the requirements of the Utah Statute. (cases cited)

See also: *Auerbach* v. *Samuels*, 10 U. 2d 159, 349 P. 2d 1112, (1960); *Salt Lake City* v. *Salt Lake Investment Co.*, 43 Utah 181, 194, 134 P. 603, (1913); *Weight* v. *Bailey*, 45 Utah 584, 147 P. 899, (1915); *Reese Howell Co.* v. *Brown*, 48 Utah 142, 158 P. 684, (1916); *Gibson* v. *Jensen*, 48 Utah 244, 158 P. 426, (1916); *Smith* v. *Edwards*, 81 Utah 244, 17 P. 2d 264, (1932).

The *Horn* decision, supra, was made in light of the three year Utah Statute of Limitations governing fraud which states in part:

> " . . . the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." U.C.A. 1953, as amended, Sec. 78-12-26(3).

The law in Utah on this point is best summarized in the case of *Taylor* v. *Moore, et al.*, 87 Utah 493, 51 P. 2d 222, (1935), as cited in *Migliaccio* v. *Continental Mining and Milling Co.*, supra, where it is stated:

> "And, Utah courts have said that 'A party who has opportunity of knowing the facts constituting the alleged fraud cannot be inactive and afterwards allege a want of knowledge that arose by reason of his own laches and negligence.' "

See also: *Larsen* v. *Utah Loan and Trust Company*, 23 Utah 449, 65 P. 208, 17A, C. J. S., Sec. 448, Page 560; 37 Am. Jur. 2d 555.

Other cases have referred to that "opportunity of knowing" as notice. The case of *Columbian National Life Insurance Co.* v. *Rogers*, supra, is worth requoting on that issue. The court there said:

> "Knowledge which is sufficient to lead a prudent person to inquire about the matter when it could have been ascertained conveniently, constitutes notice of whatever the inquiry would have disclosed, and will be regarded as knowledge of the facts."

The case at bar is of greater impact. The defendant was beyond the point of inquiry because she "knew" there was no reservation whatsoever contained in the contract.

McConkie v. *Hartman*, 529 P. 2d 801, (1974), is the most recent holding of the Supreme Court of Utah concerning the issue of the Statute of Limitations. The facts of that case are strikingly similar to those before the court in the instant matter. In that case the original purchasers from the defendant assigned their interest under a purchase contract to the plaintiffs. In the original purchase contract between the defendant and the purchasers, the defendant reserved the mineral rights to himself and his wife. Such reservation was recorded on Warranty Deeds that were deposited with an escrow. In November of 1960, plaintiffs and the defendants entered into a real estate contract which corrected and amended some of the conditions of the real estate contract between the defendants and the original purchasers. This contract contained no reservation of mineral rights. In December of 1960, the defendants had their attorney prepare two Warranty Deeds to replace the original Warranty Deed, and these new deeds contained the reservation of the mineral interests. In 1964, plaintiffs negotiated for a loan with Travelers Insurance Company. At the same time they paid to the escrow the balance due on the contract and directed the escrow holder to deliver the Warranty Deeds to Security Title Company for title insurance. The court below was affirmed in its determ-

ination that the Statute of Limitations had run against the plaintiffs in the following language:

> "The court below found that the plaintiffs had full opportunity to discover the reservations in the deeds when the deeds were delivered to Security Title Company and when they reviewed problems in the chain of title. That all of the circumstances existing at or about the time the deeds were recorded were such as to furnish full opportunity to the plaintiffs for the discovery of the mistake or fraud, if any existed. The court further found that more than eight years had elapsed since the time for reasonable inquiry on the part of the plaintiffs would have revealed the mistake or fraud to the time of filing their complaint. The trial court concluded that the claims of the plaintiffs are barred by the Statutes of Limitations above referred to."

The case at bar, one more time, is stronger in its facts than is *McCoknie* v. *Hartman*, supra. The defendant admits knowledge of the lack of reservation of the oil, gas and mineral rights in the contract.

Also, restatements of a fraudulent misrepresentation or a mutual mistake by one who originally made it, after the party has been put on a duty of inquiry, do not of themselves constitute concealment excusing delay in bringing an action for the damages thereby occasioned. See: *Feak* v. *Marion Steam Shovel Company*, 84 F. 2d 670 (C. A. 9, 1936); 70 A. L. R. 942 (Examination of

real property before entering into a contract precludes recission on grounds of falsity of representations); 107 A. L. R. 589.

POINT VII.

THE TRIAL COURT ERRED IN RULING THAT THE PLAINTIFF ACQUIESCED IN ACCEPTING THE RETURN OF THE MONEY OFFERED AS TENDER IN COMPLETION OF THE LEASE-SALES CONTRACT.

The Second Amended Answer and Counterclaim states:

> "Even if plaintiff properly exercised a valid option, he later acquiesced to its rejection by the defendant."

In factual support of the foregoing proposition, counsel cited Exhibit 10, a letter from Reid Bench to Erma Pace, dated June 15, 1971. Plaintiff contends that proposition should be rejected for several reasons.

To begin, the language of the Lease-Sales Contract makes it clear the writing was complete and unambiguous on its face. (Ex. 2) The contract contained an easy to understand option to purchase which could be exercised by simply making a $2,000.00 down payment. When the time came for the exercise of the option, the down payment was made and accepted without question or reservation. (R. 106) Although the defendant claimed that

there was a discussion at the time of tender concerning a future contract for the sale of the property (R. 89), nothing was put in writing and no additional consideration was exchanged. Therefore, no valid alteration was made to the clear and unambiguous terms of the original Lease-Sales Contract. At that point, all that was required to purchase the land had taken place, but for continued payments as per the original Lease-Sales Contract. Several months later the defendant attempted to append conditions to the option not contained in the original contract including the requirement of an escrow (Ex. 6) and the reservation of mineral rights.

Next, the letter of Mr. Beaslin, dated April 5, 1971, with all due respect, is at the least forceful in nature. It reads in part as follows:

> "Also, pursuant to the Escrow Agreement, which Mr. Sam prepared, and which you have a copy of, would have to be executed, or, you will merely continue on with the lease until the same expires by its terms, which would be September 15, of 1973."

The letter goes on to state:

> "If you want to exercise the option to purchase the property, then it will be necessary that you either sign the Escrow Agreement and place the same at the bank, together with a deed from Mrs. Pace to be delivered upon the payment of the contract amount in full, or, it will

> be construed that you have not in fact bought the property."

The proposed escrow agreement, contrary to the terms of the contract, contained a reservation of oil and gas rights. Mr. Bench, without benefit of legal counsel, responded to the Beaslin letter and stated:

> "I agreed to lease the property with an option to purchase and the terms of said purchase were agreed upon by both Owners and Lessee. I have not signed the papers prepared by Mr. Sam because these terms are being changed." (See Exhibit 8.)

Defendant has claimed the original lease-option agreement in this case contains numerous ambiguities, including the nature of title and extent of interest. This conclusory claim is unsupportable by specifics or case law to show that any ambiguity in fact exists in said document. As we pointed out in oral argument there are no ambiguities in the contract. There was no need of an escrow. Payments following the exercise of the option could have been made directly to the seller just as they were before the exercise of the option. It is true that an escrow holder could have received a deed from Mrs. Pace to await final payment but it would have been just as easy for her to make out a deed and hold it herself to await the final payment.

The settlement negotiations which resulted are listed below and serve to underscore the fact that the plaintiff

in no way acquiesced in the rejection of his tender under the sales option. It will be recalled that the $2,000.00 had been returned by Mrs. Pace on June 2, 1971, and the option exercise repudiated.

First, the plaintiff's letter of June 15, 1971, (Ex. 10) contains the following language:

> "It is only our desire and intention to purchase the farm as per our original lease purchase agreement and the terms there outlined. Let's get together and iron out the difference."

This language cannot be interpreted as an acquiescence in the repudiation of the option. Rather, that language clearly shows the plaintiff was never willing to accept the refunded money and abandon his rights under the contract.

Second, plaintiff, after writing the aforementioned letter, continued to attempt, as best he could, to compromise the difficulty he had come to realize existed between the parties to the contract. (R. 129) Though these attempts failed, they certainly served as notice to Mrs. Pace that the plaintiff, again, did not acquiesce in the rejection.

Third, with the realization that his attempts to compromise had failed, Mr. Bench filed this action on November 30, 1972. This filing came at a point in time sufficiently close to the June 15, 1971, letter and the subsequent failure to compromise so as to give notice to Mrs. Pace that the plaintiff did not acquiesce in the

repudiation of his attempted exercise of the option. It is well established that specific performance is an equitable remedy. It is also well established that equity aids the vigilant and refuses to help those who sleep on their rights to the prejudice of the party against whom relief is sought. 71 Am. Jur. 2d 126-127.

As is apparent from the factual sequence of events stressed herein, plaintiff was not guilty of acquiescence in the defendant's rejection nor is he guilty of unreasonable delay, which might prejudice the defendant, in the commencement of this action. The plaintiff acted at all times in such a manner as to give notice that he rightfully expected his option and tender to be honored according to the written agreement between the parties.

We also point out to the Court that at the time the lawsuit was filed, plaintiff was still within the time for exercising his option. The case was filed on November 30, 1972, and the option period would not expire until September 15, 1973. In the Complaint, plaintiffs ask for specific performance of the contract including the right to exercise his option. Certainly, it was apparent by this time that the formal handing of $2,000.00 once again to the defendant would have been to no avail, and the law has never required the performance of a useless act.

We cite *Williston on Contracts*, 3rd ed. Vol. 15, p. 447, as follows:

> "Section 1819 . . . WAIVER OF OBJECTION TO TENDER. Under general

> principles previously discussed, tender is excused by obstruction or prevention or imposition of unwarranted conditions by the person to whom it is to be made. So where the obligee has manifested to the obligor that tender, if made, will not be accepted, the obligor is excused from making tender as it would be at most merely a futile gesture."

Counsel calls attention to a document he calls "An oil lease disclaimer . . ." That is not the title of the document. The title of the document is "Proof of Possession." (Ex. 12) The Court should note that such document was placed before plaintiff for signature long after the rights and obligations of the parties had become fixed. He agreed to sign the document only after attorney Mangan had assured him that his rights, pursuant to the original contract, including his oil and gas rights, would not in any way be jeopardized. (R. 136, 141)

POINT VIII.

DEFENDANT'S FAILURE TO PRODUCE HER SON AARON AT TRIAL IS A MATERIAL FAILURE IN HER OVERALL BURDEN OF PROOF.

At this point it is interesting to note that the defendant held the property as a tenant in common with Aaron Pace, her son. The signatures of both appear on the Lease-Sales Contract. At no time was Aaron Pace called to testify, however, concerning the original signing

of the Lease-Sales Contract here in question. Since Mr. Pace was a party to the events at issue, one must conclude that he was not misled or mistaken concerning the Lease-Sales Contract and its contents. If Mr. Pace was was not a party to the same misunderstandings as the defendant, one must conclude defendant has not met her evidentiary burden of establishing fraud or mistake by "clear and convincing" evidence. (See Points IV and V on Fraud and Mistake.) If one cotenant is misled or mistaken, while another is not, the evidence does not reach the point of being "clear and convincing." This is especially true where Aaron was in a confidential relationship with defendant.

CONCLUSION

The turning point of this case centers around one question to and answer of defendant on cross-examination.

> "Q. You were aware very early in the proceedings of the failure to have the reservation of oil and gas rights in the document, were you not?
>
> A. *I was aware that it should have been in there before I ever signed it.*"

On the fraud issue of right of reliance, if defendant was aware of the omission of the oil and gas rights reservation in the contract and also of the further fact that "it should have been in there," she had no right to rely on any misrepresentations made by plaintiff, even assuming such to exist. On the mutual mistake of fact issue,

said testimony conclusively demonstrates that defendant was not mistaken either as to the absence of a reservation of oil and gas rights in the contract *or of the importance of its omission* in said document, because she admitted voluntarily and not as a result of a leading question that, "I was aware that it should have been in there . . ."

The case law we have cited in this brief places the legal burden on a party claiming a mutual mistake of fact of comporting himself in a non-negligent manner. Defendant was plainly and simply guilty of negligence in not taking timely steps to reform the instrument, knowing that the reservation of oil and gas rights, "should have been in there."

On the Statute of Limitations and Laches issue, the three year period began to run when defendant either knew or should have known that the contract did not reserve the oil and gas rights which she now claims. Her unequivocal admission that she knew the reservation of said rights was not set forth in the contract and furthermore that said reservation "should have been in there" before she ever signed the contract, started the Statute running and precludes the defenses of fraud and mistake.

As has been explained on the issue of tender, after defendant's acceptance of plaintiffs' tender, the respective rights, duties and obligations of the parties were fixed by the terms of the Lease Sales Contract. Any negotiations subsequent thereto were simply attempts to settle a disputed claim. Defendant's repudiation of

the tender was unequivocal leaving no doubt of her intent not to honor the terms of the Lease Sales Contract. Therefore, plaintiffs were left with no alternative to commencing this action.

On the basis of the foregoing, it is respectfully submitted to the Court that the judgment of the court below should be reversed and plaintiffs should be granted the specific performance prayed for in their Complaint.

Respectfully submitted,

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